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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, SECRETARY OF THE TREASURY; S. S. SOKOL, COMMISSIONER OF ACCOUNTS, PETITIONERS

v.

WILLIAM B. RICHARDSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–53a) is reported at 465 F. 2d 844. The opinion and order of the district court (Pet. App. B, pp. 55a–58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972. On October 11, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 17, 1972, and the petition was filed on December 15, 1972. This

Court granted the petition on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person has standing in his capacity as a federal taxpayer to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, Section 9, clause 7 of the Constitution, which generally provides for the publication of statements of expenditures of public money.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, clause 7 of the Constitution provides as follows:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

31 U.S.C. 1029 provides as follows:

> It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures by each separate head of appropriation.

The Central Intelligence Agency Act, 50 U.S.C. 403 *et seq.*, provides in pertinent part:

50 U.S.C. 403f(a):

> In the performance of its functions, the Central Intelligence Agency is authorized to—
>
> Transfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a to 403c, 403e to 403h, and 403j of this title without regard to limitations of appropriations from which transferred; * * *

50 U.S.C. 403j(b):

> The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

STATEMENT

This suit was brought for the purpose of obtaining a declaration of unconstitutionality of provisions of the Central Intelligence Agency Act which provide that in the interests of national security, the annual financing of that agency shall not be made public. The complaint sought to require the Secretary of the Treasury to publish the details of C.I.A. appropriations in the "Combined Statement of Receipts, Expenditures, and Balances of the United States Government" required by 31 U.S.C. 1029 (App. 1–16).[1] The complaint alleged that the Act violated Article I, Section 9, clause 7 of the Constitution insofar as that clause requires a regular statement and account of public funds (App. 5).[2]

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[1] 50 U.S.C. 403f(a) and 403j(b) authorize the C.I.A. to receive funds from other agencies and to expend those funds on the certification of the agency director. Congress found these provisions necessary to provide "for the annual financing of Agency operations without impairing security." S. Rep. No. 106, 81st Cong., 1st Sess., p. 4. Committees of Congress oversee agency financing, and approval by the Office of Management and Budget is necessary before other agencies may transfer funds to the C.I.A. Because funds are not appropriated directly to the agency, the Combined Statement which reports "expenditures by each separate head of appropriation" (31 U.S.C. 1029) does not reflect C.I.A. financing.

[2] The *pro se* complaint contains a variety of other, nonrelated allegations, *e.g.*, that the C.I.A. is "a para-military organization," that it "purchase[s] news reporting services," and that the vice-president has been "assigned to duties not prescribed by the Constitution" (App. 6, 15), all asserted to be in violation of various constitutional provisions. However, the complaint "primarily, and most prominently" attacks the Act's secrecy provisions (App. 5; see App. 9–15, 15–16). The other allegations were not pressed by respondent below and were not treated in the opinions of the courts below.

The plaintiff (respondent in this Court), William B. Richardson, alleged that he was a proper person to invoke the judicial process to decide these issues because he is "a taxpayer paying Federal income taxes and other Federal taxes" (App. 3).[3] The only specific injury respondent alleged was that he "cannot obtain a document that sets out the expenditures and receipts" of the C.I.A. but was "asked to accept a fraudulent document" (App. 5).

The district court refused to convene a three-judge court and dismissed the complaint, holding that respondent's allegations did not confer standing as a taxpayer under *Flast* v. *Cohen*, 392 U.S. 83 (Pet. App. B, pp. 55a–58a). The court of appeals, sitting *en banc*, reversed and remanded for a hearing by a three-judge court; three circuit judges dissented.[4]

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[3] Respondent also alleged that he was "a member of the electorate" as well as "a loyal citizen of the United States" (App. 3). However, the parties did not treat the issue of the standing of respondent as a citizen independently of his standing as a taxpayer, nor was the issue of citizen standing briefed in the lower courts, or discussed in detail in the court's opinions. See Pet. App. A, p. 13a, n. 8. Indeed, the *amicus* brief filed below on behalf of respondent at the request of the court of appeals questioned his standing as a citizen. See Brief at 14–15, n. 15. In any event, respondent stated that he "does not challenge the formulation of the issue contained in the petition for certiorari" which was limited to respondent's standing as a taxpayer. See Brief in Opposition in No. 72–885, p. 1.

The question of the standing of a citizen to challenge governmental action *qua* citizen is pending in *Richardson* v. *Reservists Committee to Stop the War*, No. 72–1188, certiorari granted, April 23, 1973.

[4] The case was initially argued before a panel consisting of two circuit judges and a district judge sitting by designation. After a second round of briefs, the court *sua sponte* determined

The court below held that respondent had standing as a taxpayer to challenge the constitutionality of the Central Intelligence Agency Act (Pet. App. A, pp. 10a–16a), under the criteria of *Flast* v. *Cohen*, *supra*.[5] The court understood the *Flast* test for determining whether a taxpayer has a sufficient adversary interest to give him standing as requiring that "(1) the plaintiff must establish a nexus between his status as a taxpayer and the challenged Government activity to give him a personal stake in the action; and (2) his claim must relate to a specific constitutional prohibition so that the issues may be sharpened and focused suffi-

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to hear the case *en banc* without further argument. The district judge on the original panel sat *en banc*. We believe this was improper, since, under 28 U.S.C. 46(c), the court *en banc* consists only of circuit judges in active service and any retired circuit judge who participated in the original hearing. Cf. *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688–691. Indeed, the purpose of *en banc* decisions, to permit all active circuit judges to decide an important question that will control in the circuit (*id.* at 689–690), is inconsistent with permitting a district judge to participate in that process. We believe, however, that the error was harmless in this instance, since the district judge voted with the majority of five circuit judges. Although one of these five disagreed on the basis for the holding, the result without the district judge's vote would still have been the same.

[5] The court of appeals did not reach the district court's alternative ground for dismissing the complaint, that the method chosen by Congress for funding C.I.A. activities presented a political question; the court below concluded that the political question issue is so "intertwined with the merits of the case" that it should be considered by the three-judge court which it directed to hear the case on remand (Pet. App. A, p. 20a). The convening of the three-judge court has been stayed pending decision by this Court on the standing question.

ciently for proper judicial resolution" (Pet. App. A, p. 11a).

Considering the first part of the test, the court concluded that *Flast* was not limited to challenges to appropriations. Instead, it held that "[t]he personal stake may come from any injury in fact even if it is not directly economic in nature" (Pet. App. A, pp. 13a–14a), and concluded that the frustration of respondent's desire to know how his tax money is spent constituted such an injury.

The court further reasoned that the second part of the test in *Flast* was met, since, it believed, Article I, Section 9, clause 7 is a specific limitation upon the taxing and spending power of Congress, even though it recognized that the clause is not a substantive limitation but "is procedural in nature" (Pet. App. A, pp. 14a–15a).

After an extended analysis of the principles of standing as applied by this Court in particular cases (Pet. App. A, pp. 24a–44a), the three dissenting judges concluded that the relevant considerations for determining standing were as follows:

> * * * Is the constitutional right asserted of such paramount importance so as to obviate the need to allege and prove direct, personal impact which is individualized as distinguished from an impact shared by every member of the body politic? If not, does the plaintiff allege a direct personal injury or impact caused by the violation of the asserted constitutional right? [Pet. App. A, p. 48a.]

The dissenters concluded that unlike the right to liberty of conscience or to equal voice in the electoral process—at issue in the earlier cases relaxing standing requirements[6]—Article I, Section 9, clause 7 is not of such "pre-eminent importance that the traditional requirements of standing should be waived" (Pet. App. A, pp. 47a, 49a–50a). They also concluded that respondent did not allege a direct personal injury, but only shared a general public interest (Pet. App. A, p. 51a).

SUMMARY OF ARGUMENT

This Court has consistently required a party seeking judicial relief to allege facts which demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204. The requirement of such a specific interest is designed to insure that the issues will be presented "in an adversary context and in a form historically viewed as capable of judicial resolution," *Sierra Club* v. *Morton*, 405 U.S. 727, 732, and will involve something more than "generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen*, 392 U.S. 83, 106.

The court below concluded that a taxpayer has standing to litigate whenever he alleges any "injury in fact" stemming from an asserted violation of any constitutional provision "related to the appropriations process" (Pet. App. A, pp. 13a, 14a). That conclu-

[6] See *Flast* v. *Cohen*, 392 U.S. 83; *Baker* v. *Carr*, 369 U.S. 186.

sion cannot be squared with the decision of this Court in *Flast* v. *Cohen*, 392 U.S. 83, defining the limited circumstances in which status as a taxpayer gives standing to challenge a federal statute. That decision indicates that before a court can hear such a challenge, a plaintiff must make two showings. First, he must demonstrate a "logical nexus" between his status as a taxpayer and the statute he challenges. Second, he must show a nexus between his status and the "precise nature of the constitutional infringement alleged." 392 U.S. at 102. As the Court explained, that first test is satisfied only when a taxpayer challenges the constitutionality of Congress' exercise of its power under Article I, Section 8, clause 1 to tax and spend for the general welfare. The second test can be fulfilled, the Court held, only when the taxpayer relies on a clause of the Constitution that embodies a "specific" limitation upon "the exercise of the congressional taxing and spending power"—there, the Establishment Clause of the First Amendment. 392 U.S. at 102–103. If the plaintiff cannot make both showings in filing his lawsuit, he fails to demonstrate "the necessary stake as [a] taxpayer in the outcome of the litigation to satisfy Article III requirements." 392 U.S. at 102.

Respondent satisfies neither aspect of the required nexus carefully defined in *Flast*. He does not allege the unconstitutionality of any exercise of congressional power under the taxing and spending clause of Article I, Section 8. His complaint goes only to the procedures followed in appropriating and reporting expenditures, not to the constitutionality of the expenditures them-

selves. Thus, he asserts no interest in the expenditure of his tax moneys which would provide the logical or practical link between his status as a taxpayer and the legislative enactment attacked. Secondly, respondent's assertion that the Central Intelligence Agency Act is inconsistent with Article I, Section 9, clause 7 of the Constitution is not sufficient to meet the second branch of the test. That clause was not designed to be, and has never been interpreted as being, a limitation upon the congressional taxing and spending power. Instead, it establishes the procedures which the Executive Branch is to follow in accounting for the expenditure of funds appropriated by Congress. Even if respondent's assertion that the Act is inconsistent with this clause were correct, and even if a specific report of C.I.A. financing were constitutionally required, respondent has no direct and personal stake as a taxpayer in the enforcement of this clause.

ARGUMENT

RESPONDENT'S STATUS AS A TAXPAYER GIVES HIM NO STANDING TO CHALLENGE CONGRESSIONAL ACTION THAT DOES NOT INVOLVE EXPENDITURE OF HIS TAX DOLLARS FOR PURPOSES THAT VIOLATE A SPECIFIC CONSTITUTIONAL LIMITATION UPON THE TAXING AND SPENDING POWER

A. INTRODUCTION: THE TESTS FOR TAXPAYER STANDING UNDER *FLAST* V. *COHEN*

In *Flast* v. *Cohen*, 392 U.S. 83, this Court re-examined the question of the standing of a plaintiff, who alleges only his interest as a taxpayer, to invoke the jurisdiction of the federal courts in a challenge to the validity of an act of Congress. In *Frothingham* v.

Mellon, 262 U.S. 447, the Court had held that a taxpayer suing in that capacity alone lacked standing to contend that a federal spending program exceeded the bounds of national power.[1] As the Court noted in *Flast*, the decision in *Frothingham* had stood as "an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." 392 U.S. at 85. In reviewing the problem in *Flast*, the Court finally made clear that standing is one ingredient of "justiciability," the term of art that reflects the constitutional limits of the judicial power of the federal courts. Under Article III of the Constitution, the role of the federal judiciary is confined to the adjudication of "cases" and "controversies." Embedded in those terms are principles that limit "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast, supra*, 392 U.S. at 95. In addition, those words "define the role assigned to the ju-

[1] The Court in *Frothingham* reasoned (262 U.S. at 487): "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."

diciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.*

Applying these principles, the Court there concluded that the essence of standing is whether the plaintiff has "the personal stake and interest that impart the necessary concrete adverseness to such litigation" so that his invocation of the judicial process will be "consistent with the constitutional limitations of Article III." 392 U.S. at 101. The Court explicitly adhered to *Frothingham* in holding that there is no constitutional standing "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." 392 U.S. at 106. But, it was held, *Frothingham* should not be read as an absolute bar to taxpayer standing, since a taxpayer "may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case." 392 U.S. at 101.

In formulating the controlling test, applicable in the present case, for determining whether a taxpayer *qua* taxpayer has standing to maintain a particular suit, the Court insisted on a particular "nexus between the status asserted by litigant and the claim he presents * * *." 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the uncon-

> stitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. * * * Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. [392 U.S. at 102–103.]

The taxpayers in *Flast* established the "logical link" between their status as taxpayers and the enactment challenged, because the challenged programs (under the Elementary and Secondary Education Act of 1965) involved substantial amounts of federal tax funds being expended under the General Welfare Clause of Article I, Section 8. The Court considered the second aspect of the test satisfied by the assertion that the expenditure violated the Establishment Clause of the First Amendment, because the history of that Clause showed that it was specifically designed to prohibit the use of the federal taxing and spending power to aid religion. 392 U.S. at 104. The Court expressly reserved judgment on

whether there are *any other* clauses in the Constitution that could be considered "specific limitations" on the taxing and spending power sufficient for standing purposes.[4] Finally, the Court summarized the narrow exception to *Frothingham* being carved (392 U.S. at 105–106):

[4] Mr. Justice Stewart and Mr. Justice Fortas filed concurring opinions (392 U.S. at 114 and 115), expressing their views that *only* the Establishment Clause was a sufficiently specific limitation upon the congressional power to tax and spend to authorize taxpayer standing. Mr. Justice Fortas noted: "The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause." 392 U.S. at 116.

The lower federal courts, with the exception of the court below, have rejected claims that various other constitutional provisions besides the Establishment Clause constitute "specific limitations" upon the exercise of the taxing and spending power. *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.), affirmed, 401 U.S. 901 (Art. I, § 6, cl. 1; compensation of members of Congress); *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042 (Art. I, § 8, cl. 11; war power); *Pietsch* v. *President of the United States*, 434 F.2d 861 (C.A. 2), certiorari denied, 403 U.S. 920 (same); *Lamm* v. *Volpe*, 449 F.2d 1202 (C.A. 10) (Tenth Amendment); see *Reservists Committee to Stop the War* v. *Laird*, 323 F. Supp. 833, affirmed, C.A.D.C., No. 71–1535, October 31, 1972, certiorari granted, No. 72–1188, April 23, 1973 (Art. I, § 6, cl. 2; no member of congress to hold executive office); *Atlee* v. *Laird*, 339 F. Supp. 1347 (E.D. Pa.), dismissed on other grounds by three-judge court, 347 F. Supp. 689 (Art. I, § 8, cl. 11; war power).

Various commentators have concluded that only the Establishment Clause constitutes a sufficiently specific limitation upon the power to tax and spend to permit taxpayer standing. Note, *Constitutional Law—Establishment Clause—Standing*, 57 Ill. Bar J. 236, 244 (1968); Note, *Constitutional Law—Federal Taxpayer's Standing to Challenge Constitutionality of Federal Statutes*, 17 Journal of Public Law 419, 424 (1968); Note, *Constitutional Law—Standing to Sue: What Remains of the Frothingham Rule?*, 48 Neb. L. Rev. 536, 540–552 (1969); Note, *Standing—Taxpayers Allowed to Challenge Federal Expenditures*, 42 Temple L. Q. 70, 75–76 (1968).

> * * * we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action [1] under the taxing and spending clause is [2] in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. * * *

As we shall now explain, respondent in the present case does not meet either of the tests established by *Flast* and thus he does not properly have standing to maintain this action in his capacity as a taxpayer.

B. BECAUSE RESPONDENT'S CHALLENGE IS DIRECTED TOWARD THE PROCEDURES FOLLOWED IN APPROPRIATING AND ACCOUNTING FOR TAX FUNDS, AND NOT TOWARD THE EXPENDITURE OF THOSE FUNDS FOR A CONSTITUTIONALLY IMPERMISSIBLE PURPOSE, HE HAS NOT SHOWN A SUFFICIENT NEXUS BETWEEN HIS STATUS AND THE CHALLENGED ENACTMENT TO GIVE HIM STANDING

Although respondent relies upon his status as a federal taxpayer, his suit is not directed at exercises of congressional power under the taxing and spending clause, Article I, Section 8, clause 1. Respondent does not rest his alleged standing as a taxpayer on claims that appropriations are being spent for constitutionally impermissible purposes.[9] On the contrary, he refers to the appropriation process only in the sense that he challenges the manner in which certain appro-

[9] Respondent's *pro se* complaint does suggest that the C.I.A. may be spending funds for such purposes as "purchas[ing] news reporting services" and that it is "a para-military organization" (App. 6). But the specific constitutional limitations that such activities may transgress are not clearly articulated. The court below did not treat any of those assertions as material to respondent's standing as a taxpayer since the focus of the lawsuit was seen to be the unavailability of a report on C.I.A. appropriations and expenditures.

priations are labelled and reported. As the court of appeals pointed out in its earlier dismissal of these allegations, *Richardson* v. *Sokol*, 409 F. 2d 3, 5 (C.A. 3), certiorari denied, 396 U.S. 1042, "[t]he appropriations per se are not a part of the 'matter in controversy.' Rather, appellant challenges only the propriety of the accounting procedure employed" (footnote omitted).[10] In the present proceedings, the court of appeals rejected this distinction, and instead extended *Flast* to regard "any injury in fact" related to the appropriations process as sufficient for purposes of taxpayer standing (Pet. App. A., p. 14a).

In *Flast*, however, this Court specifically stated that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. 1, § 8, of the Constitution," 392 U.S. at 102. The Court emphasized that taxpayer standing is limited to cases alleging unconstitutional expenditures by noting that allegations of "an incidental expenditure of tax funds in the administration of an essentially regulatory statute" would not be sufficient. In so holding, the Court explained that the test being formulated was "consistent with the limitation imposed * * * in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952)." 392 U.S. at 102. In *Doremus*, the Court dismissed a state

[10] Respondent's first complaint was dismissed for failure to allege or establish that the "matter in controversy" exceeded the $10,000 minimum necessary for jurisdiction under the "federal question" statute, 28 U.S.C. 1331(a). The court of appeals declined to reach the standing question on that appeal. The present suit was commenced under other jurisdictional statutes.

taxpayer's suit challenging bible reading in public schools, concluding that the

> taxpayer's action can meet this test [of standing under Article III], but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference * * * (*Doremus* v. *Board of Education*, 342 U.S. 429, 434).

The Court dismissed the appeal there because the taxpayers did not possess "the requisite *financial* interest that is, or is threatened to be, injured by the unconstitutional conduct." 342 U.S. at 435 (emphasis added).

Other federal courts have recognized the limited exception to *Frothingham* established in *Flast*, and have denied standing to taxpayers to challenge federal statutes and actions which do not involve expenditures under the taxing and spending clause, for where plaintiff "can claim no injury to his pocketbook by the statute * * * [he] has no standing as a federal taxpayer." *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176, 179 (D.N.J.) (three-judge court); see, also, denying taxpayer standing where expenditures made under other than Article I, Section 8; *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.) (three-judge court), affirmed, 401 U.S. 901; *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042; cf. *Bradford* v. *Greene*, 440 F. 2d 265 (C.A.D.C.); compare *Protestants and Other Americans* v. *Watson*, 407 F. 2d 1264, 1265 (C.A.D.C.) (expenditure must be "substantial").

The court below nevertheless held that a taxpayer has standing to raise issues that do not involve contentions that the appropriation and expenditure of his money is being done for an invalid purpose. Instead, the court held: "The personal stake may come from any injury in fact even if it is not directly economic in nature" (Pet. App. A, p. 14a). The right claimed to be involved here—the right to be informed of the disposition of government funds—was held sufficient because it is "integrally related to the appropriations process" (Pet. App. A, p. 13a)." But it bears reitera-

" The court below found the necessary "logical link" between the enactment attacked and appellant's status as a taxpayer in its belief that, unless petitioner gets the information the statute makes secret, he will have no basis for challenging expenditures in a direct taxpayer suit of the sort authorized by *Flast* (Pet. App. A, p. 13a). This is, of course, a broadening of *Flast*, since it grants standing in situations where the taxpayer's interest is in discovering whether he has an interest of the sort identified in *Flast* as affording an assurance "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor" to present a justifiable challenge (*Flast*, *supra*, 392 U.S. at 106).

In such cases, the taxpayer is, we submit, in a situation more similar to the plaintiff in *Linda R. S.* v. *Richard D. et al.*, No. 71-6078, decided March 5, 1973, than to the taxpayer in *Flast*. In *Linda R. S.*, this Court held that the plaintiff, mother of an illegitimate child, had no standing to challenge the constitutionality of a state statute which, as applied, provided a criminal penalty for the failure of a father to support his legitimate children. Although a decision that the statute also applied to the fathers of illegitimate children might persuade the father of plaintiff's child to provide support, such a prospect was only speculative, and did not provide the necessary "'direct' relationship between the alleged injury and the claim sought to be adjudicated * * *." Slip op. 5. Similarly, here, the possibility that, if disclosed, the appropriations and expenditures of the CIA might provide information to the taxpayer on the basis of which he might wish to challenge the operations of the CIA, is too speculative to provide that relationship.

tion that we are concerned here with respondent's alleged standing *as a taxpayer*. As the dissenting judges pointed out, the obligation to publish a statement of account under Article I, Section 9, clause 7 is at most one owed "to the public generally" and petitioner has no special interest *as a taxpayer* which is affected by any possible failure to account (Pet. App. A, p. 51a). The fact that respondent pays taxes is irrelevant to his rights under clause 7; thus respondent has "merely a general interest common to all members of the public" which does not confer standing upon him. *Ex Parte Levitt*, 302 U.S. 633, 634; *Laird* v. *Tatum*, 408 U.S. 1, 13; *Sierra Club* v. *Morton*, 405 U.S. 727.[13]

In this case, where the target of respondent's suit is not the allegedly illegal expenditure of substantial amounts of federal revenue, there is simply not that kind of concrete adverseness and personal stake in the outcome that were held necessary in *Flast* to permit a taxpayer, suing only in that capacity, to invoke the federal judicial process. In setting forth the nub of a proper claim of taxpayer standing, the Court in *Flast* explained: "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."

[13] As Professor Davis has observed: "Even though the law of standing is so cluttered and confused that almost every proposition has some exception, *the federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing.*" Davis, *Administrative Law Treatise*, 1970 Supplement, § 22.09–6, p. 753.

392 U.S. at 105–106. In this case, however, respondent's status as a taxpayer is in no way implicated by his suit; he is not complaining of illegal exaction of his taxes or even of illegal application of federal revenues. Whether his view of the public accounting question is right or wrong does not have any impact on him in his capacity as a taxpayer. Thus, to the extent that respondent is before this Court seeking to maintain his lawsuit solely in the role of a taxpayer, he must be regarded as having no precise and definable interest in the outcome of the question on the merits. Rather, he is claiming the mantel of taxpayer to "air his generalized grievances about the conduct of government" (392 U.S. at 106) when there is no real nexus between that status and the statutes he challenges.

In light of the constitutional dimension of the standing requirement, and its reflection of the allotment of functions among the various branches of the government, the result reached below is both unauthorized and unwise. The speculative "any injury" test created by the court below, which would sustain taxpayer standing so long as some grievance colorably related to the appropriation process is alleged, would disserve the policies established by Article III. It would inject the federal courts into consideration of virtually every imaginable question bearing on the constitutionality of the actions of the legislative and executive branches at the behest of a disgruntled "taxpayer" who wants to ventilate his opposition to some governmental program or procedure. There is no basis

in *Flast* v. *Cohen* for permitting this result, and no basis for repudiating the limitations carefully explained in *Flast* that bar respondent from maintaining this suit.

C. ARTICLE I, SECTION 9, CLAUSE 7 IS NOT A SPECIFIC LIMITATION UPON THE TAXING AND SPENDING POWER AND THEREFORE AN ALLEGATION OF ITS VIOLATION DOES NOT CONFER STANDING UPON A TAXPAYER

We have discussed above our reasons for contending that there is an inadequate nexus between respondent's status as a taxpayer and the nature of the congressional enactment he wants to attack. Respondent in addition fails to pass the second test for valid taxpayer standing.

The second aspect of the *Flast* test is that the taxpayer must establish that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." 392 U.S. at 102–103. The allegation that the funding of the Central Intelligence Agency Act is inconsistent with Article I, Section 9, clause 7 is not sufficient under this test.[13] Unlike the Establishment Clause, which *Flast* found to be a specific limitation on Congress (392 U.S. at 103–104), the Statement and Account Clause does not limit the congressional tax-

[13] Article I, Section 9, clause 7 provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

ing and spending power. Instead it is a limitation on the Executive Branch, requiring that money paid from the Treasury must first be appropriated by Congress, and that monies received and spent must be reported in accordance with appropriations. See, *e.g., Reeside* v. *Walker,* 11 How. 271, 290; *Knote* v. *United States,* 95 U.S. 149, 154; *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321.

Furthermore, this clause was not designed to secure the "right" that the court below found was at issue when it conferred standing on respondent—the right of a "responsible and intelligent taxpayer * * * to know how his tax money is being spent" (Pet. App. A, p. 14a). As we shall show, the purpose and scope of clause 7 do not support an individual taxpayer's right to satisfy his curiosity about the details of funding a sensitive federal agency on the ground that it falls within the "zone of interests to be protected" by that clause. *Sierra Club* v. *Morton, supra,* 405 U.S. at 733. Thus, respondent's status as a taxpayer does not authorize him to invoke the clause. The enforcement of this provision is left to the legislative and executive branches of the government.[11]

[11] The Court below apparently felt impelled to accord respondent standing, reasoning that if he "is not entitled to maintain an action such as this to enforce the dictate of article I, section 9, clause 7, * * * then it is difficult to see how this requirement * * * may be enforced at all" (Pet. App. A, p. 15a). This argument is unsupportable, for it proceeds on a premise that is at fundamental odds with Article III of the Constitution; it presupposes that every issue of implementation of the Constitution *must* be translated into a judicial question. That there may be *no* person who has a sufficiently direct, personal, and adverse interest in the outcome of a debat-

The history of the adoption of Clause 7 shows that it was "intended as a restriction upon the disbursing authority of the Executive department," *Cincinnati Soap Co.* v. *United States, supra,* 301 U.S. at 321, but allows Congress to decide how much of the reports from the Executive should be made public. In brief, the relevant materials show that, far from imposing an absolute limit on the power of Congress to tax and spend—necessary under *Flast* for taxpayer standing—the Framers of the Constitution wanted to assure by this clause that Congress could adequately monitor the Executive, while recognizing that "there might be some matters which might require secrecy." 3 Farrand, *The Records of the Federal Convention of 1787,* p. 326 (1911).

The Statement and Account Clause was not contained in the original draft of the Constitution; it was suggested from the floor during the final stages of the Convention, when George Mason moved to require an annual account of public expenditures. James Madison proposed to amend this motion to provide such reports "from time to time" in order to "leave enough to the discretion of the Legislature," and Madison's amendment was adopted. 2 Farrand, *supra,* at 618–619.

The debate between Mason and Madison was renewed in the Virginia convention in 1788, with Mason

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able constitutional question cannot be of use to a would-be plaintiff who lacks standing to sue. Rather, the absence of any adequate plaintiff would simply underscore the conclusion that the issue lacks the concreteness of a justiciable "case" or "controversy." As the dissent notes, there are a number of other constitutional provisions which can not be litigated (Pet. App. A, p. 51a, n 30).

opposing the language that Madison had proposed and the Constitutional Convention had adopted:

> The reasons urged in favor of this ambiguous expression, was, that there might be some matters which might require secrecy. In matters relative to military operations, and foreign negotiations, secrecy was necessary sometimes. But he [Mason] did not conceive that the receipts and expenditures of the public money ought ever to be concealed. * * * But that this expression was so loose, it might be concealed forever from them * * *.

3 Farrand, *supra,* at 326. Patrick Henry, another opponent of the provision as adopted, pointed out that

> * * * the national wealth is to be disposed of under the veil of secrecy; for [with] the publication from time to time * * * they may conceal what they may think requires secrecy. * * *

3 Elliot's *Debates on the Federal Constitution,* 462 (1836). As the debates make clear, the principal reason for modifying Mason's original language was to permit secrecy in matters which required it. Mason's view that public expenditures "ought [n]ever to be concealed" was rejected by the Framers, and the language which Patrick Henry felt would allow Congress to "conceal what they may think requires secrecy" ultimately prevailed.

Article I, Section 9, clause 7, relating to accounting for federal expenditures, does not in express terms authorize secrecy, as does Article I, section 5, clause 3, which provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the

same, except such Parts as may in their Judgment require Secrecy * * *." But the Framers, as discussed above, clearly contemplated secrecy of at least some reports of expenditures. Thus, Madison indicated that Congress could authorize secrecy in both cases:

> The congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used, but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system [the Articles of Confederation]. That part which authorizes the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the [Articles of] confederation * * *. [3 Farrand, *supra*, 312.]

In addition, of course, it would be foolish to attribute to the Framers an intention to include in the Constitution an absolute obligation on the part of the Executive, enforceable at the suit of an individual taxpayer, to publicize every expenditure, even though the Constitution explicitly authorizes each House to keep secret its debates and decisions on these very matters.

The history of congressional understanding of the Statement and Account Clause shows that it has never been interpreted as preventing *Congress* from deciding (as it has in the Central Intelligence Agency Act) that certain narrow classes of federal expenditures should not be disclosed where delicate questions of foreign policy or military security are involved. Shortly after the Constitution was adopted, President Madi-

son (who had proposed the constitutional language) sent a confidential communication to Congress outlining his recommendation that he be authorized to take possession of parts of Spanish Florida. Congress then passed a secret appropriation act, appropriating one hundred thousand dollars for the occupation and forbidding the publication of the appropriation law. See Miller, *Secret Statutes of the United States*, Government Printing Office (1918); 3 Stat. 471–472. The statutes were not made public until 1818 when the controversy over Florida had ended.

More recently, Congress has found secrecy to be in the national interest in several settings. For example, over $2 billion was secretly expended on the Manhattan Project to develop the atomic bomb during World War II. See also statutes making confidential appropriations, *e.g.*, 28 U.S.C. 537 (F.B.I. expenditures); 31 U.S.C. 107 (Presidential expenditures for foreign intercourse); 42 U.S.C. 2017(b) (Atomic Energy Commission expenditures).

Congress has generally provided in 31 U.S.C. 66b(a) that the Secretary of the Treasury should regularly prepare reports on the financial operations of the government "for the information of the President, the Congress, and the public." The Court below relied on the fact that these reports are also intended for the benefit of "the public" (Pet. App. A, p. 9a). But the critical fact is that Congress has specifically directed in the Central Intelligence Agency Act, at issue here, that reports on the funding of that agency should remain confidential, and in so doing has exer-

cised what has been consistently regarded, since the foundation of the Republic, as a legitimate congressional prerogative.

Thus, in terms of the second branch of the *Flast* test for taxpayer standing, it must be recognized that neither the language of the Statement and Account Clause—which does not provide or imply that Congress may appropriate funds only if the appropriation and expenditure is publicly reported—nor its constitutional history imposes "specific constitutional limitations * * * upon the exercise of the congressional taxing and spending power * * *." 392 U.S. at 103.

Moreover, even to the extent that this clause bears upon the interest of the general populace in knowing how federal funds are being spent, there is no basis for enlarging the restrictions against taxpayer suits. The complaint makes no allegation that there has been a total refusal by Congress or the Executive to publish information about the federal budget or the state of the economy. All that is involved here is the attempt to keep confidential the funding of one sensitive agency, whose funds are accounted for among the expenditures charged to other departments.

In addition, respondent's interest in the details of C.I.A. funding—which, legally, is indistinguishable from the "interest" of millions of other persons similarly situated—hardly rises to the dignity of the constitutional right involved in *Flast*. Because First Amendment freedoms "need breathing space to survive," a broader concept of standing is appropriate

in that area. See *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433; *Abington School District* v. *Schempp*, 374 U.S. 203, 266–267, n. 30 (Brennan, J., concurring); Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U. L. Rev. 207, 226–227 (1963). In contrast with the core values involved in *Flast*, Article I, Section 9, clause 7 is a quiet and placid backwater, a provision rarely litigated and hardly central to the Constitution. This circumstance renders doubtful the occurrence of a substantial adversary interest, and makes inappropriate the extension of taxpayer standing to allow litigation under that clause.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with directions to affirm the district court's order dismissing the action for lack of standing by respondent to maintain it.

Respectfully submitted.

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